

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDITH A. TURNER
Claimant

VS.

RUBBERMAID - WINFIELD, INC.
Respondent

AND

AMERICAN MOTORISTS INSURANCE COMPANY
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 144,263

ORDER

ON the 7th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Assistant Director William F. Morrissey, dated October 12, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, Robert R. Lee, of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Frederick L. Haag, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas.

RECORD

The record considered by the Appeals Board for purposes of this review is the same as that set forth in the Award of the Assistant Director dated October 12, 1993, and the Appeals Board adopts that specification of the record as if fully set forth herein.

STIPULATIONS

For purposes of this appeal the Appeals Board adopts those stipulations listed in the Award of the Assistant Director dated October 12, 1993.

ISSUES

- (1) Whether claimant suffered personal injury by accident arising out of and in the course of her employment with the respondent on the date alleged.
- (2) The nature and extent of claimant's disability, if any.
- (3) Whether claimant should be entitled to any further vocational rehabilitation services.
- (4) Whether temporary total compensation has been underpaid.
- (5) Whether claimant should be reimbursed unauthorized medical expense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a 33-year old who completed the tenth grade and subsequently received her GED. She suffered personal injury arising out of and in the course of her employment with the respondent on December 5, 1989. While performing her regular job duties of putting grommets in faucets in two-gallon jugs which required her to bear down with her left hand, she began experiencing symptoms. These initially were in the left upper extremity but eventually developed to include pain in the left hand, left shoulder, shoulder blade, neck and back. Intermittently she also had complaints on the right side but these have resolved.

Claimant was initially referred by her employer to Dr. Sturich and subsequently by him to Dr. Watts who diagnosed left thoracic outlet syndrome. He prescribed anti-inflammatory medication and physical therapy. He also administered cortisone injections. Claimant testified that she did not receive relief from these treatments. Dr. Watts took claimant off work for a period of seven weeks and then released claimant to return to work restricted to light duty with a 10 pound lifting limitation and a restriction against overhead work. On May 7, 1990 Dr. Watts raised the lifting restriction to 25 pounds but continued the restriction against overhead work. Claimant did return to work with respondent and performed job tasks within those restrictions.

Claimant was also seen at the request of her employer by Dr. Kneidel, an orthopedic surgeon in Wichita, Kansas. He diagnosed a left rotator cuff tendinitis.

Claimant subsequently requested a change of authorized treating physician to Dr. Pollock. By Order dated June 5, 1990 the Administrative Law Judge authorized Anthony G.A. Pollock, M.D., and any medical entity referred by him for medical treatment.

Dr. Pollock is a board certified orthopedic surgeon. He first saw claimant on June 26, 1990, again in July and for the last time on August 7, 1990. Claimant related a history of injury at work in December of 1989 when using her left arm which then became real heavy. She was unable to keep up her pace at work. The next day she had increased soreness in the left shoulder and neck and after reporting her condition to her supervisor she was referred to the company doctor and had subsequent medical referrals. By history she had received treatment including physical therapy, anti-inflammatory medication, steroid injections for the shoulder and trigger point injections. She underwent testing including EMG and nerve conduction studies, bone scan studies, and x-rays, all of which were reported as normal. Claimant complained of loss of grip strength, weakness in the shoulder, arm and neck, and tightness in the neck and upper shoulder girdle. She also complained of headaches. Physical examination was performed which was essentially normal except for some tenderness over the medial border of the scapula, shoulder girdle, trapezius and levator scapulae musculatures. Dr. Pollock prescribed a TENS unit and

instructed her to continue with exercises and with light duty work. At the time of his initial examination claimant was working for the respondent at a job described as the Number 10 Lid Machine which accommodated her restrictions.

At the time of Dr. Pollock's last examination the claimant continued to have complaints of pain and heaviness in her shoulder. As all tests were normal Dr. Pollock testified that he expected claimant to make a full recovery. However, he had nothing further to offer her at that time and therefore referred her to Dr. Horsley, a physiatrist. In February of 1991 Dr. Pollock issued a report in which he opined that claimant did not have any permanent impairment of function and that she could be released to work without restrictions.

James Irwin Horsley, M.D., is a physiatrist at the Wesley Rehabilitation Hospital. He is board certified in physical medicine and rehabilitation. He first saw claimant on August 27, 1990. At that time her complaints of pain were primarily in the shoulder blade and the scapula. Movement of the cervical spine brought on the pain as opposed to movement of the shoulder. This caused him to believe that the problem was in the cervical spine. He diagnosed a cervical strain. X-rays were obtained which were normal. He recommended home exercises and ordered physical therapy. He continued to see claimant in September, October, November and had a final appointment with her on December 19, 1990. At that time he was of the opinion that there was no lesion in the disk of the cervical spine and therefore she did not need restrictions at work. She was released to her regular work, without restrictions. He also released claimant from further medical care and stated that she did not have any permanent impairment of function.

Dr. Horsley conceded that at his last examination of claimant she still had complaints of pain and that her range of motion, although improved, was still limited. However, she had what Dr. Horsley described as inconsistent presentations of complaints and signs of a non-organic origin for those complaints. His prescription dated November 12, 1990 read, "Mrs. Turner is released to regular duty work at this time."

Dr. Lawrence Blaty saw the claimant on November 8, 1991 at the request of claimant's counsel. Lawrence Richard Blaty, M.D., is a physiatrist, board certified in the field of physical medicine and rehabilitation. A preliminary hearing was held on October 15, 1991 on claimant's request for change in authorized treating physician. The Administrative Law Judge issued an Order dated November 15, 1991 for an independent medical examination by Dr. Blaty and by Order of November 26, 1991 medical treatment was ordered under the direction of Dr. Blaty. At the initial examination in November of 1991 claimant presented complaints of left shoulder pain to Dr. Blaty which she described as having developed in 1989. He prescribed physical therapy which failed to result in any significant improvement of her symptoms. Initially Dr. Blaty thought the symptoms were isolated around the rotator cuff area but ultimately diagnosed a myofascial pain syndrome, a generalized soft tissue irritability in the posterior shoulder area. He found muscle spasm and tightness in the back of her shoulder. However, he decided physical therapy was not going to provide the desired relief and therefore ordered a functional capacity evaluation (FCE) which was performed in March of 1992. Although the FCE indicated that the claimant might benefit from a work hardening program, Dr. Blaty was reluctant to order work hardening because it might aggravate her symptoms. After discussing this with the claimant it was decided that he would simply give her restrictions. He placed physical restrictions upon her to limit her functioning to the light to medium physical demand level. Maximum lifting was restricted to 40 pounds occasionally and 35 pounds frequently. Her maximum overhead lift was restricted to 20 pounds occasionally and 15 pounds frequently. Other restrictions included occasional overhead reaching, occasional squatting up to 10 times per hour with no repetitive upper extremity lifting. He recommended against employment requiring repetitive and continual movement of the upper extremity, especially

lifting throughout the working day because that type of activity could aggravate her condition. Repetitive and continual movements of the upper extremity were limited to not more than two-thirds of the working day. He felt her physical condition was most consistent with repetitive overuse syndrome. He rated her at a five percent (5%) permanent impairment to the whole body on a functional basis.

Dr. Blaty conceded that it was almost two years since claimant's December 5, 1989 accident date when he first saw her in November of 1991. By that time claimant should have recovered from the effects of a soft tissue injury. It was further conceded that her activity, including the work she performed at Exide Battery carrying 30 to 35 pound batteries up to 700 per day for 5 days did likely perpetuate her symptomatology and aggravated her condition although he does not know how much, if any, permanent problems resulted from that employment leading to the condition she presented at the time he saw her. It would be a contributing factor to his opinion regarding her present permanent impairment and need for medical restrictions however. Dr. Blaty further testified that claimant had a normal physical examination with full range of motion in the cervical area and in both shoulders with normal strength and sensation in the upper extremities. Clinically, her examination was entirely normal. Based solely upon the physical findings he would agree there was no permanent impairment of function and that based solely on those findings he probably would not impose any restrictions. However, taking into consideration the history and complaints, in his opinion restrictions were appropriate to avoid re-injury or an aggravation of symptomatology. He further testified that he was uncertain as to the cause of her symptoms because he did not know the claimant back in December of 1989. Although the claimant is capable of working in the light to medium physical demand level at the time he examined her, participation in work hardening would likely allow the claimant to progress to return to work at the medium physical demand level.

Claimant testified that she was employed at Rubbermaid for nine and one-half years working on the line and as an inspector. She worked on every line in the production of different sizes of coolers, water jugs and trash cans. At the time of her injury of December 5, 1989 she was working in the process of putting faucets into two-gallon coolers. This required the use of her left hand to hold the faucet down while using her right hand to screw the nut on. Applying the pressure with her left hand as time went on caused her left shoulder to start bothering her. She finished working that day but when she came to work the next day she was still having problems and asked to see the doctor. At the conclusion of her shift she was sent to Dr. Sturich in Winfield who put her on light duty for a week with instructions that if the shoulder wasn't any better to return. She worked light duty jobs for a week and on December 14, 1989 she returned to Dr. Sturich. He referred her to Dr. Watts and took her off work. She first saw Dr. Watts on January 5, 1990 and he kept her off work until January 24, 1990. After returning to work with restrictions she continued to have physical problems and was referred to Dr. Kneidel for a second opinion.

She worked on lighter duty jobs including the Number 10 Lid Machine and the Blue Ice Line until September of 1990. She continued to have problems which she described as getting worse during this period of time. In September of 1990 she requested a two week leave of absence from the company which was granted. She never returned from that two week leave of absence. No explanation was given to the company for her departure. Claimant moved to Salina and since that time has been actively seeking employment. She worked one week at Exide Battery in Salina and one day for Valassis Inserts through Kelly Services putting inserts into newspapers. At the time of her deposition, on August 28, 1992, she was working for Bruce Holmes Construction in Wichita

about 20 hours per week at \$5.50 per hour. She was doing clean-up, painting, and odd jobs. She did not feel that she could return to any of the work she performed for respondent although she conceded that the Blue Ice Line and Number 10 Lid Machine areas were within the weight restrictions imposed by Dr. Blaty.

A vocational rehabilitation assessment was conducted by Karen Crist Terrill, a certified vocational rehabilitation counselor. As a part of this assessment she performed an on-site job analysis as to the actual physical demands of the position claimant performed upon her return to Gott/Rubbermaid at Winfield. In her opinion claimant was not in need of further vocational services because both Dr. Pollock and Dr. Horsley released claimant to return to work without restrictions and, secondly, she had in fact returned to work and had been successfully employed with the respondent at a comparable wage for a period of eight months, leaving that employment for reasons unrelated to her medical condition. She did not take into consideration the restrictions of Dr. Blaty because his treatment was subsequent to the completion of the vocational assessment. The job analysis was for the Number 10 Lid Machine that makes 3-quart, 5-quart and 10-quart lids. The heaviest lid weighs 10 ounces. The claimant's job consisted of trimming around the lid with a scraper. The lids are then stacked on a pallet which on the lowest level is about one foot off the ground. They are stacked five high on the pallet. The job did not require any overhead reaching. The work table where the claimant worked was 35 inches off the ground. Claimant also worked on the Blue Ice Line. This area consists of three separate jobs where workers rotate every hour to the next work station. One work station is the job of a hand packager where the boxes never exceed more than 27.14 pounds. The worker packages Blue Ice into a box, then tapes the box and places it on a pallet. The second job is on Machine Number 42 where the worker checks for plastic parts on the Blue Ice which should not be there. If there is excess plastic then the Blue Ice is placed on a conveyor belt which starts at floor level. The third work area consists of loading Blue Ice onto a conveyor belt. The conveyor at this work station is approximately waist-high and the worker stacks one Blue Ice after another onto the conveyor belt. Claimant testified that these jobs were within the weight restrictions imposed by Dr. Blaty but she disagreed with Karen Terrill as to whether these jobs required any overhead reaching or lifting.

Testimony was also received from two vocational experts, Dan Goldstein on behalf of the respondent and Jerry Hardin on behalf of the claimant. Both offered opinions as to the claimant's ability to perform work in the open labor market and to earn comparable wages. However, for the reasons stated herein the Appeals Board does not reach the issue of work disability.

The evidence fails to establish a need for further vocational rehabilitation services, nor does it disclose an underpayment of temporary total disability benefits.

The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge, shall have the authority to grant or refuse compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. K.S.A. 44-551(b)(1).

Pursuant to K.S.A. 44-510e, there is a presumption that the employee has no work disability if, after the accident, the employee engages in work for wages comparable to the average gross wage she was earning at the time of the injury. Our Appellate Court has indicated in Locks v. Boeing Co., 19 Kan. App. 2d 17 (1993), that the presumption of work disability is a rebuttable presumption. The Appeals Board finds, however, that under the facts and circumstances in this case, the presumption has not been overcome. The evidence indicates that claimant returned to an accommodated position at the same wage and was able to perform this work for a period of approximately eight months whereupon she voluntarily quit her employment. Although the claimant now alleges that she left this employment due to her medical condition, this was never reported to her employer nor to her physician. The Appeals Board finds that the claimant left her employment with the respondent for reasons unrelated to her physical condition. As the presumption of no work disability has not been overcome, the award is based upon functional impairment. See Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all of the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-501(a) states in part:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Although there is conflicting evidence as to whether the claimant has suffered a permanent impairment of function, the Appeals Board adopts the five percent (5%) rating given by Dr. Blaty and hereby finds that claimant has sustained a five percent (5%) permanent partial general bodily disability.

AWARD

WHEREFORE, an award of compensation is hereby made in favor of the claimant, Judith A. Turner, and against the respondent, Rubbermaid-Winfield, Inc., and its insurance carrier, American Motorists Insurance Company, and the Kansas Workers Compensation Fund, based on an average weekly wage of \$395.54, for an injury occurring December 5, 1989, for 34 weeks of temporary total disability compensation at the rate of \$263.71 per week in the sum of \$8,966.14 and 381 weeks of compensation at the rate of \$13.19 per week for five percent (5%) permanent partial impairment of function in the sum of \$5,025.39 for a total award of \$13,991.53.

As of October 12, 1993, there is due and owing to the claimant 34 weeks of compensation at \$263.71 per week in the sum of \$8,966.14 and 167.14 weeks of permanent partial compensation at the rate of \$13.19 per week in the sum of \$2,204.58, making a total of \$11,170.72 all of which is past due and owing and ordered paid in one lump sum less compensation heretofore paid. The remaining 213.86 weeks are to be paid at \$13.19 per week until fully paid or further order of the Director.

Further vocational rehabilitation benefits at the expense of the employer are denied.

Unauthorized medical expense, if any, is ordered paid up to the \$350.00 statutory maximum allowance upon proper presentation of said expense to the respondent and Fund.

All compensation, medical expenses and costs herein are to be paid two-thirds by the Kansas Workers Compensation fund and one-third by respondent, as per their stipulation.

Costs are hereby assessed two-thirds to the Kansas Workers Compensation Fund and one-third to the respondent to be paid directly as follows:

BARBER & ASSOCIATES		
Continuation Transcript of Regular Hearing		\$ 303.20
DEPOSITION SERVICES		
Transcript of Preliminary Hearing		\$ 96.25
Transcript of Motion Hearing		\$ 88.25
Transcript of Motion Hearing		\$ 66.95
Transcript of Regular Hearing		\$ 67.00
Deposition of Dan Goldstein		\$ 204.60
Deposition of James I. Horsley, M.D.		\$ 145.60
Deposition of Karen Crist Terrill		\$ 129.80
Deposition of Anthony Pollock, M.D.		\$ 148.60
	TOTAL	\$ 947.05
DON K. SMITH & ASSOCIATES		
Deposition of Jerry Hardin		\$ 520.00
Deposition of Lawrence Blaty, M.D.		\$ 285.75
	TOTAL	\$ 805.75
IRELAND & BARBER		
Transcript of Preliminary Hearing		\$ 141.65
Transcript of Preliminary Hearing		\$ 109.95
	TOTAL	\$ 251.60

IT IS SO ORDERED.

Dated this _____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert R. Lee, 1861 North Rock Road, Ste. 320, Wichita, Kansas 67206
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